

RETHINKING REWRITING: TRIBAL CONSTITUTIONAL AMENDMENT AND REFORM

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This Essay examines the recent wave of American Indian tribal constitutional change through the framework of subnational constitutional theory. When tribes rewrite their constitutions, they not only address internal tribal questions and communicate tribal values, but also engage with other subnational entities, i.e. states, and the federal government. This Essay applies that framework to a study of tribal constitutional amendment and reform procedures. Focusing on the processes of constitutional change produces insight into tribes' status as "domestic dependent sovereigns" in the contemporary era of self-determination, a status reflected in the opportunities, and limitations, inherent in tribal constitutions. In so doing, this Essay aims to highlight an aspect of tribal constitution writing that enables successful reform and communicates the significance and goals of constitutionalism within the tribal context.

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I. INTRODUCTION: THEORIZING TRIBAL CONSTITUTIONAL REFORM

“[C]onstitutional reform . . . is . . . an exercise of sovereignty. . . . With constitutional reform we’re talking about Indian nations doing what they have to do . . . to address common problems The question should be, . . . as a truly sovereign nation, is this constitution, this form of government, acceptable to us? To our people? That should be the question. And that should be the only question. And if it is acceptable to our people, . . . then it is and that’s the way it should be. That is sovereignty.”

-- Hon. Albert Hale, Former President, Navajo Nation¹

Today is an exciting time for constitutional reform within the United States. American Indian tribes—numbering 566 recognized by the federal government and an additional 100 tribes recognized by state governments—have engaged in a substantial wave of constitutional amendment and reform, motivated to establish genuinely self-governing institutions and necessitated by the influx of economic development in Indian Country. The frequency of constitutional redevelopment perhaps rivals the pace of tribal constitution drafting during the era of the Indian Reorganization Act of 1934 (IRA). The Commissioner of Indian Affairs at that time remarked that the writing of tribal constitutions happening was “probably the greatest in number ever written in an equivalent length of time in the history of the world.”²

Although many tribes possessed full-scale constitutions—written or otherwise—well before the IRA,³ that Act established a federal government policy and process for adopting tribal constitutions. The Act also resulted in both the quick dispatch of field staff to Indian reservations to provide technical assistance as well as the attention of Washington bureaucrats, who made legal suggestions and revisions.⁴ Ultimately, ninety-seven tribes adopted IRA constitutions between October 1935 and January 1939; countless others adopted constitutions through the IRA-defined process; and just under 200 possess written constitutions today.⁵

¹ Albert Hale, *Firsthand Account: Why Engage in Constitutional Reform?*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 83, 84–85 (Eric D. Lemont ed., 2006).

² JOHN COLLIER, FROM EVERY ZENITH: A MEMOIR 177 (1963).

³ David Wilkins suggests that sixty tribes had constitutions or “documents in the nature of constitutions” on file with the Department of the Interior prior to the IRA, at least forty of which predated the New Deal era entirely. David Wilkins, *Introduction* to Felix S. Cohen, *On the Drafting of Tribal Constitutions*, in AMERICAN INDIAN TRIBAL LAW 145 (Matthew L.M. Fletcher ed., 2011).

⁴ DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 105 (2007).

⁵ Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 704 n.153 (1989); Felix S. Cohen, *Indians at Work*, in AMERICAN INDIAN TRIBAL LAW 143 (Matthew L.M. Fletcher ed., 2011). Elmer Rusco makes the worthwhile point that the continuing large gap between Indian tribes and the number of written constitutions—with roughly only one-third of organized tribes possessing written constitutions—suggests there remains

A growing body of contemporary scholarship documenting tribal constitutions has been forming, but much of this scholarship has focused on the *substantive* structures of tribal governments being overhauled: the use of separation of powers principles in light of the troubles with overly authoritarian and unitary tribal councils; the need for an independent judiciary; and the crafting of membership requirements.⁶ However, with limited exceptions, the scholarship has focused less on the *processes* of tribal constitution drafting. Tribes amending existing constitutions or adopting wholly new governing documents do so against the backdrop of existing-yet-outdated IRA constitutions, under the federal government's prevalent supervision, and frequently in response to major crises in tribal government. In this process, tribes make important decisions regarding the frequency and scope of future constitutional reform and the mechanisms they employ to enact reforms. These decisions affect the success of any constitutional rewriting and communicate the significance and goals of constitutionalism within the tribal context.

Of course, tribes in the United States that are engaged in the constitutional amendment or reform process do not possess the unbounded sovereignty of a separate and independent nation. Since early Supreme Court jurisprudence, Indian tribes have operated with a special status termed "domestic dependent nations."⁷ Despite a Constitution that treats tribes largely as separate entities,⁸ tribes' dependent sovereign status has been continually reaffirmed and rearticulated in recent Supreme Court decisions. Most notably, Indian tribes do not possess criminal jurisdiction over non-Indians;⁹ they possess little civil jurisdiction over non-Indians except under exceptional circumstances;¹⁰ and Congress, under the plenary power doctrine, may legislate regarding Indian tribes with virtually unbridled discretion, leaving tribes unable to invoke even the United States Constitution as a limitation.¹¹

In accordance with the significant limitations on tribal sovereignty, much scholarship on tribal constitutions focuses on the role of the Department of the Interior and the Bureau of Indian Affairs (BIA) in approving tribal constitutions or amendments, viewing the resulting documents as inauthentic expressions of tribal self-governance.¹² For many tribes, constitutional provisions have been enacted not just through tribal expressions of popular sovereignty, but through significant pressure from a sometimes

much to learn about non-written or non-constitutional governance among tribes. Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 49, 74 (Eric D. Lemont ed., 2006).

⁶ See, e.g., AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS (Eric D. Lemont ed., 2006) (largely focusing on historical and substantive accounts of tribal reform or issues regarding the citizenship and legitimacy of tribal governments); MIRIAM JORGENSEN, REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (2007).

⁷ Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

⁸ Resnik, *supra* note 5, at 691 ("To the extent Indian tribes are discussed in the Constitution, they seem to be recognized as having a status outside its parameters. Indian tribes are treated as entities with whom to have commerce and to make treaties.").

⁹ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

¹⁰ See Montana v. United States, 450 U.S. 544 (1981) (noting that the Crow Indian tribe had power to regulate hunting and fishing of non-Indians in tribal lands, but not non-Indian lands within the reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (not falling under limited exception, tribal court lacked jurisdiction to adjudicate allegedly tortuous act occurring on-reservation by state warden); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (holding that tribal court lacked jurisdiction over discrimination claim against a non-Indian over sale of fee land).

¹¹ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); *id.* at 58 ("This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.").

¹² Rusco, *supra* note 5 ("Graham D. Taylor and several other scholars have argued that [the IRA] forced cookie-cutter non-Native governments on most tribes or nations."); FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS (2007).

hostile separate sovereign. For example, although Congress ultimately rejected mandatory secretarial approval of every tribe's constitution or proposed amendment, many tribes nonetheless included such provisions in their constitution, whether in part because of BIA pressure or the security of federal support.¹³ Other scholars emphasize the BIA's development of a "model constitution," which it expected tribes to adopt with only minor adjustments.¹⁴

By contrast, this Essay advocates viewing tribal constitutional change through the lens of tribal agency, albeit agency situated within and limited by the super-sovereign federal government. Similar to Judith Resnik's approach to tribal courts and the federal court system, this Essay argues that tribal constitutions must be understood as "a product of the interaction between tribal customs and the Bureau of Indian Affairs, the Department of Interior, and federal Indian policy."¹⁵ Tribes remain (involuntarily) dependent, and have molded constitutions under the sometimes strong-arm of the federal government, but tribes' contemporary efforts to draft new constitutions remain both engaged with and resistant to this super-sovereign. As Resnik notes, "[t]here are assimilationist pressures but not complete assimilation. Something more than subdivisions of the federal government currently exist."¹⁶

To better understand the present condition of tribal constitutional change and its implications for tribal governance within the federal system, this Essay will examine the processes of constitutional amendment and reform within the American Indian tribal context. First, Part II reviews the history of tribal constitution writing. In particular, Part II.A explores the existence of tribal constitutions, or similar documents, prior to the Indian Reorganization Act. Part II.B recounts the IRA's process of tribal constitution drafting, which standardized procedures for drafting and amending constitutions and continues to exert considerable influence over tribal constitutional change today, while Part II.C assesses the impact and success of the IRA constitution-drafting project. Part II.D reviews the present moment of frequent constitutional rewriting in light of increased tribal self-governance.

Part III then examines tribal constitutional amendment and reform through a comparative analysis with United States federal and state constitutions, as well as through theory on subnational constitutional systems. While an imperfect analogy, emphasizing tribal constitutions' role in a subnational system helps to explain important structural aspects about tribal constitutions, such as their relative ease of amendment.¹⁷

¹³ Resnik, *supra* note 5, at 712 n.186; 713 n.189 (noting that the Supreme Court's preemption doctrine might result in advantages to Indian tribes from federal involvement in tribal constitution drafting).

¹⁴ GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM* 37 (1980). Rusco, *supra* note 5, at 74, rejects the notion of a "model constitution," suggesting that non-lawyer employees within the BIA developed rough drafts of constitutions with Native leaders prior to the involvement of Washington D.C.-based attorneys, and that the BIA specifically decided *not* to prepare a model constitution.

¹⁵ Resnik, *supra* note 5, at 734.

¹⁶ *Id.* at 750. Compare the federal influence on IRA constitutions with the South African Constitution, which prescribes a model for provincial constitutions to adopt within the national constitution and allocates an ongoing role for federal judicial review of all subnational constitutional changes prior to their taking effect, clearly defining and limiting the permissible range of local variation. See Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder and Cantons*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 3, 7–9 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004).

¹⁷ For his part, IRA architect Felix Cohen explicitly stated that many governmental functions included in tribal constitutions were modeled on municipalities. David E. Wilkins, *Introduction to FELIX COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS* xi, xxii (2007) (noting Cohen suggested tribal governments were "to be like town governments, except that they would have federal protection and their special rights"). Although many tribes may possess the population size of small towns, larger tribes possess population sizes closer to small states. For example, the 2010 U.S. Census reported 287,000 people identify as Navajo, with an on-reservation population of 173,667 and 284,247 people

Part III begins by examining the frequency and scope of tribal constitutional change. Part III.A focuses on constitutional amendments, or small-scale changes to existing constitutions. This section considers provisions, such as mere majority vote provisions and voter initiative capabilities, that make constitutional amendment relatively frequent, as well as provisions that limit amendment, such as the widespread requirement for approval from the Secretary of the Interior prior to changes taking effect. In particular, section III.A considers the Cherokee Nation's more than twenty-year-long attempt to adopt a new constitution, approved by tribal voters in 2003. This pursuit ultimately failed because of a voluntarily included provision in the previous Cherokee constitution requiring secretarial approval.

Part III.B focuses on reform, or more wholesale constitutional change. It considers the circumstances motivating frequent tribal constitutional reform today through a case study of the Cherokee Nation Constitutional Convention and reform process from 1999 until 2003. Among the factors motivating the drafting of entirely new constitutions are the need for a plethora of new governance provisions, major governance disputes within the existing tribal government, and the difficulties of defining eligible tribal members and reform participants.

Part IV concludes by suggesting that federal influence on tribal constitutional drafting is not unidirectional, making tribal constitutions an important site for understanding the larger American constitutional landscape.

II. BACKGROUND: SITUATING TRIBAL CONSTITUTIONS

A. A Once Strong Tradition of Sovereignty

Prior to the arrival of European settlers in North America, Native American peoples exercised largely independent and uninterrupted sovereignty on their traditional lands.¹⁸ Governance often did not occur on the level of the entire tribe or nation but instead through loose and decentralized forms such as villages, lineages, clans, and bands.¹⁹ Subgroups exercised considerable independence, and a consensus-oriented decision-making model tended to encourage groups to separate and make their own decisions rather than enforce a majority will upon a dissenting minority.²⁰

Although most tribes did not govern through formal constitutions, approximately sixty tribes had constitutions or similar documents on file with the Department of the Interior prior to the federal policy of encouraging and establishing tribal governments ushered in by the IRA.²¹ The earliest tribal constitutions included creation stories and other narratives that described fundamental community

identify as Cherokee. U.S. CENSUS BUREAU, 2010 CENSUS BRIEF: THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION, at 14, 17, *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

¹⁸ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 123–124 (1998) (noting that in early United States history “the Indian territory was entirely the province of the tribes, and they had jurisdiction in fact and theory over all persons and subjects present there.”).

¹⁹ Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS* 11, 14 (Eric D. Lemont ed., 2006).

²⁰ *Id.*

²¹ Wilkins, *supra* note 17, at xxi. At least forty of these documents predated the New Deal era entirely, although many tribes began to adopt constitutions when it became clear that federal policy would encourage such documents prior to the official passage of the IRA.

values and governance structures.²² Although never proven, some claim that the United States Constitution's preamble was inspired in part by a Haudenosaunee treaty from 1520, which began "We, the people, to form a union, to establish peace, equity, and order. . . ."²³ South Carolina's John Rutledge, Chairman of the Committee of Detail at the 1787 Constitutional Convention in Philadelphia, apparently admired the Iroquois legal system and read from the treaty to open a session of the Convention.²⁴

Even prior to the IRA, tribes' desire and need to earn credibility from and manage relations with the federal government resulted in some of the first written tribal constitutions. Several Southeastern tribes adopted constitutions in the first half of the nineteenth century to manage relations with the United States government.²⁵ For example, the Cherokee Nation, motivated by the need to demonstrate its "civilized" status in the face of increasing infringement on Cherokee land, adopted a constitution in 1827 that established a three-branch government, a bicameral legislature, and a bill of rights.²⁶ Other tribes adopted constitutions to facilitate a legal claim against the federal government. For example, the Turtle Mountain Tribe's Constitution was written in the twentieth century to advance its claim of restitution for an unconscionable nineteenth century treaty negotiation.²⁷

Many tribes possessed constitutions prior to the IRA only to have the United States government abolish the tribal government altogether. For example, Congress' 1906 Five Tribes Act effectively abolished the tribal courts and governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes despite the existence of written constitutions.²⁸ During the allotment era, the United States abolished the 1881 Osage Nation Tribal Constitution after the discovery of oil on Osage territory led the United States to assume jurisdiction over tribal membership and property.²⁹

Thus, well before the IRA, many American Indian tribes and communities possessed documents or ideas achieving constitutional significance, sometimes, but not always, prompted by tribal interaction with the United States government. These pre-IRA examples demonstrate a clear link between the drafting of written constitutions and tribal attempts to establish legitimacy in the eyes of a federal government exercising increased authority over them. The drafting accelerated dramatically as the IRA shifted official federal policy from tribal assimilation to tribal self-governance.

²² FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05 (Nell Jessup Newton ed., 2005); Rennard Strickland, *Wolf Warriors and Turtle Kings: Native American Law Before the Blue Coats*, 72 WASH. L. REV. 1043, 1053–54 (1997) (describing the oral constitutional tradition of Cheyenne, comprised of at least five varying stories exploring the origins of Cheyenne law and government, usually involving a woman who was creator and who passed down information about the uses of buffalo).

²³ CHARLES L. MEE JR., THE GENIUS OF THE PEOPLE 237 (1987). Even if not true, Felix S. Cohen, a prominent influence on IRA tribal constitutions, believed that this influence of the Iroquois constitution on the U.S. Constitution was true. See MITCHELL, *supra* note 4, at 78.

²⁴ MEE, *supra* note 23, at 237.

²⁵ COHEN, *supra* note 22, § 4.05, at n.561; Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 475 (2002) (noting that the Choctaw, originally based in the Mississippi River Valley, first wrote their Constitution in 1825).

²⁶ Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation of Oklahoma Constitutional Convention*, 28 AM. INDIAN L. REV. 1, 5 (2003-04).

²⁷ See Keith Steven Richotte Jr., "We the Indians of the Turtle Mountain Reservation . . .": Rethinking Tribal Constitutionalism Beyond the Colonialist/Revolutionary Dialectic (June 2009) (unpublished Ph.D. dissertation, University of Minnesota), available at http://conservancy.umn.edu/bitstream/54709/1/RichotteJr_umn_0130E_10395.pdf (examining episodes of constitutional history for the Turtle Mountain Indians).

²⁸ See Clarkson, *supra* note 25, at 478–79 (describing 1906 Five Tribes Act); Lemont, *supra* note 26, at 5 (describing the deterioration of the Cherokee Nation's tribal government despite its drafting of a second constitution in present-day Oklahoma shortly after its mid-nineteenth century removal from Georgia).

²⁹ HARV. PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 2008 HONOREE 1, available at <http://hpaied.org/images/resources/publibrary/Osage%20Nation%20Government%20Reform%20Initiative.pdf>.

B. IRA Constitutions and the “End of Assimilation”

The Indian Reorganization Act of 1934 sought to encourage tribal self-governance and the reservation system.³⁰ It established procedures and administrative infrastructure for approving tribal constitutions and taking land into trust on behalf of tribes.³¹ The IRA also officially declared the end of the federal government’s allotment policy, which had sought to assimilate Indians into American society by breaking up reservations into individual parcels, giving a 160-acre homestead to individual Indians, and selling “surplus” lands to non-Indians.³² Thus, the IRA reversed allotment policy, which envisioned the end of Indian tribes as separate sovereigns.³³ Whether the IRA fostered a form of genuine self-governance or merely continued to accomplish allotment’s assimilationist ends remains debated.³⁴

Unlike previous federal policies toward Indians, tribes had to “opt in” to be governed by the IRA, and referendums were held at reservations across the country. Ultimately, 181 tribes opted in, even though many of the approving tribes were brought under the fold through somewhat nefarious means.³⁵ However, the seventy-seven tribes that rejected the IRA—the largest being the Navajo Nation—still received federal recognition under a later Bureau of Indian Affairs provision that declared such tribes would be treated the same as the approving tribes,³⁶ and could also adopt governing documents through procedures other than those set forth in the IRA.³⁷

Under one of the IRA’s most far-reaching provisions, tribes had the option to adopt a constitution with assistance from the Department of the Interior’s Office of Indian Affairs (OIA), later renamed the Bureau of Indian Affairs.³⁸ Tribes and the OIA reacted swiftly to this provision, with sixty-five tribes establishing constitutions by 1937—less than three years after the passage of the Act—and ninety-three tribes doing so by 1945.³⁹

The OIA worked closely with tribes during their constitutional drafting and ratification processes. Non-attorney field agents from the OIA Organization Division traveled to reservations to promote the adoption of written constitutions.⁴⁰ Agents forwarded proposed draft constitutions to the OIA’s Washington D.C. office, where a small team of lawyers ensured the documents were “legally correct.”⁴¹ The OIA returned proposed changes to the Indians who had drafted the constitution, who

³⁰ L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 832 (1996).

³¹ William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 579–83 (2009) (discussing IRA provisions providing a mechanism for the tribal acquisition of land).

³² See, e.g., MITCHELL, *supra* note 4, at 68–69.

³³ Gould, *supra* note 30, at 832.

³⁴ Cf. Rusco, *supra* note 5, with THOMAS BIOLSI, ORGANIZING THE LAKOTA: THE POLITICAL ECONOMY OF THE NEW DEAL ON THE PINE RIDGE AND ROSEBUD RESERVATIONS 85–108 (1992).

³⁵ MITCHELL, *supra* note 4, at 110–11. A BIA legal opinion read the referendum requirement such that Indians not participating in the referendum—which was widespread given the lack of trust in the statute and federal government policy more generally—ultimately counted as votes in favor of IRA adoption rather than against; this was because the IRA required a majority of eligible voters to reject the document to avoid taking effect. Furthermore, BIA bureaucrats pressured tribes to adopt by withholding federal benefits or guidance on constitution drafting until the IRA referendum had been held. *Id.*

³⁶ Wilkins, *supra* note 17, at xxii.

³⁷ 25 U.S.C. § 476(h)(1) (2006).

³⁸ 25 U.S.C. § 476(a) (2006).

³⁹ MITCHELL, *supra* note 4, at 105–08.

⁴⁰ Rusco, *supra* note 5, at 64.

⁴¹ *Id.*

either accepted or resisted the changes.⁴² One scholar assessed the OIA's legal reviews as leaving a "substantial impact" on the content of the constitutions.⁴³ Finally, approval, through both a tribal election and sign-off from the Secretary of the Interior, was required before the constitution would take effect.⁴⁴

A year after the passage of the IRA, the Organization Division set an ambitious goal of working with thirty tribes to achieve written constitutions within a year's time.⁴⁵ This frantic pace of constitution drafting, combined with the need for administrative approval incentivizing both field agents and tribes to prefer boilerplate provisions, resulted in a substantial number of tribal constitutions with identical or nearly identical clauses.⁴⁶ The Department of the Interior also exerted its influence through a provision, included by many tribes at the OIA's urging, requiring the Secretary of the Interior to approve any subsequent amendments to the constitution or ordinances passed pursuant to the new constitution.⁴⁷

C. Assessing IRA Constitutions

More than eighty years after the IRA's passage, many tribal constitutions' design failures have become evident. Many IRA constitutions are unable to adapt to rapid economic development, increasing on-reservation interactions with nonmembers, and the shifting set of a tribe's limited powers. Most IRA tribal constitutions created a strong, unicameral legislative body—the tribal council—which integrated executive, legislative, and judicial functions, often in a small group of six members, without separation of powers.⁴⁸ Because many tribal constitutions do not provide for an independent judiciary, councils have few limits on their authority. With all blame for tribal decisions or problems attributable to the council, elections frequently result in high rates of turnover, contributing to unstable government institutions, frequent allegations of corruption, and recurring constitutional crises.⁴⁹

Moreover, IRA constitutions failed to engage with traditional tribal values, culture, and existing political institutions. By adopting a system of governance on the tribal level and using direct elections by tribal members to seat council members, vote on referenda, and approve constitutional amendments, IRA constitutions ignored tribal villages, clans, bands, families, and regions as units of governing bodies.⁵⁰ Moreover, IRA constitutions' use of majority voting models tended to displace consensus-

⁴² *Id.* at 64–65.

⁴³ *Id.* at 65.

⁴⁴ *Id.*

⁴⁵ Rusco, *supra* note 5, at 73. The pace of reforms was significantly attributable to internal pressures felt by the OIA, pressures the agency passed on to tribes. Because Congress had passed but not funded the IRA prior to a recess, the newly formed Organization Division launched an "Immediate Program" on July 31, 1934 to organize as many new tribal governments as possible in the five months prior to the next Congressional session beginning January 1935 to prove the project's goals and capability. The Program identified thirty tribes as possible targets for immediate constitutional implementation and later whittled down the list to twelve. *See* MITCHELL, *supra* note 4, at 105–08.

⁴⁶ MITCHELL, *supra* note 4, at 107.

⁴⁷ Resnik, *supra* note 5, at 712; Rusco, *supra* note 5, at 60.

⁴⁸ Champagne, *supra* note 19, at 20.

⁴⁹ *Id.*

⁵⁰ *See id.* For example, the creation of a Hopi Tribal Council jettisoned a system based on a collection of separate village governments—"each an elaborate, decentralized theocracy"—with authority affected by clan, village, Kikmongwi (the village religious leaders), and Masau'u, a mythical Hopi creation figure governing death. The Tribal Council was referred to as "the white man's government," and when religious leaders refused to certify council members, as required under the new constitution, the council eventually disbanded in 1943, seven years after its creation. Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 B.Y.U. L. REV. 449, 458–59 (1996).

based models of traditional tribal governance.⁵¹ In addition, while codifying membership provisions, many constitutions exacerbated existing intratribal cultural, religious, or ethnic divisions. This resulted in the constitutions' own eventual undoing when membership conflicts impacted the stability of tribal government or the original IRA constitution entirely.⁵² BIA pressure for the swift creation of an election apparatus to approve the IRA and then a constitution had the effect of delaying and short-changing debate among tribal members regarding membership criteria.⁵³

Despite the frequently deleterious effects of IRA constitutions on tribal self-governance, scholars differ on the extent of the federal government's role during the constitutional drafting and approval process, and the correlative legitimacy of IRA constitutions. Some view the constitutions as "largely imposed" by BIA officials, and membership-ratifying referenda as "structured with heavy Indian service influence—and without widespread community consensus or participation."⁵⁴ These scholars emphasize the federal influence on such constitutions: BIA agents charged with approving constitutional provisions sometimes threatened the existence of a tribe's reservation land, federal recognition or funding if the tribe did not incorporate BIA suggestions.⁵⁵ Other scholars note that the BIA circulated only excerpts of existing tribal constitutions, not a "model constitution," that tribes often successfully resisted incorporating specific provisions requested by the BIA, and that tribal membership approval through referendums legitimated the constitutions.⁵⁶

As Part III will demonstrate, both groups of scholars are correct: as dependent sovereigns, tribal constitution writing has inevitably occurred under the shadow of the federal government. The IRA-era influence on tribal constitution drafting is merely one instance of that structural arrangement. Today, congressional plenary power and BIA approval remain real constraints on the scope and mechanisms of tribal constitutional writing. Yet, as legitimate, albeit limited, sovereigns, tribal constitution writing plays a real role in the subnational sphere, creating constitutions responsive to, but not wholly subsumed by, the federal framework.

⁵¹ See, e.g., BIOUS, *supra* note 34, at 34–45 (describing Lakota *okaspé yamni*, literally translated as three-fourths majority councils, based on a three-fourths approval requirement for any future Indian land sales originally included in the Fort Laramie Treaty of 1868 but later adopted as the basis for future "traditional" governance, until these councils' abrogation by the majority-rule tribal councils of the IRA era).

⁵² For example, the Santa Clara Pueblo amended its 1935 constitution just four years after its creation to remove two specific paths to tribal membership: (1) children born to female members of the tribe and non-members and (2) persons naturalized into the tribe. Resnik, *supra* note 5, at 705. Given that children born to male tribal members and a non-member were accorded membership status, and that the tribe had never codified its membership rules in such a way before, this led to a later tribal dispute and eventually a failed Equal Protection claim under the Indian Civil Rights Act, decided in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁵³ Rusco, *supra* note 5, at 60.

⁵⁴ Champagne, *supra* note 19, at 19.

⁵⁵ MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 148–49 (2011) (describing BIA refusal to approve proposed Grand Traverse Band of Ottawa and Chippewa Indians constitutional provision regarding membership and its threats to refuse to declare a reservation or even reconsider federal recognition of the Band entirely, among other steps).

⁵⁶ See, e.g., Rusco, *supra* note 5.

D. The Era of Self-Determination and Contemporary Constitutional Reforms

The increasingly apparent shortcomings of IRA constitutions—often culminating in the formation of dual governments or constitutional standoffs among competing branches of tribal governments⁵⁷—have coincided with the exercise of increased powers of self-governance.

Beginning in the 1960s, a number of federal statutes ushered in a new era of tribal sovereignty: The Indian Self-Determination and Education Assistance Act of 1975⁵⁸ allowed the federal government to enter contracts directly with a tribe rather than through the BIA; the Indian Child Welfare Act of 1978⁵⁹ recognized tribal courts as the proper forum for child welfare and custody cases involving Native American children; and the Indian Gaming Regulatory Act of 1988 fostered authority to develop casinos for the economic benefit of the tribe and its members.⁶⁰

Although the powers of Indian tribes remain sharply delimited by their dependent sovereign status, self-government remains the greatest power that contemporary tribes possess and need to enunciate in their constitutions.⁶⁰ This power includes the ability to form a government, define membership criteria, regulate members' domestic relations, prescribe rules of inheritance, levy dues, fees and taxes upon tribal members and nonmembers conducting on-reservation business, exclude nonmembers from the reservation, regulate tribal property, and establish a justice system to resolve most offenses and disputes between tribal members.⁶¹

With tribes exercising expanded authority, constitutional reform to manage these increased powers has become commonplace. Today, dozens of tribes are engaged in the processes of constitutional reform,⁶² either proposing significant amendments or adopting new constitutions wholesale. Although each tribe must tailor its rewriting to its unique history, values and culture,⁶³ many tribal constitutions' common IRA heritage translates into shared reform obstacles and goals today. Confronting political instability, institutional incapacity, and governance mechanisms that fail to reflect a unique cultural heritage remain at the center of many tribes' agendas, often through designing a system with a division of branches, a strong executive, and an independent judiciary. Some commentators have compared tribes' current need to create a strong centralized authority capable of managing complex

⁵⁷ EXEC. SESSION ON AM. INDIAN CONST. REFORM, REPORT ON BEST PRACTICES IN DEVELOPING EXECUTIVE PROCESSES OF AMERICAN INDIAN CONSTITUTIONAL REFORM (2002), *available at* <http://hpaied.org/images/resources/publibrary/May%20Summary%20Report.pdf> [hereinafter EXEC. SESSION]. Many recent tribal constitutional crises have involved a tribe's disenrollment of often long-standing members. *See, e.g.*, Carmen George, *Chukchansi Tribal Council Seats Still Vacant*, SIERRA STAR (Mar. 29, 2012, 10:49 AM), <http://www.sierrastar.com/2012/03/29/57761/chukchansi.html> (describing standoff between four newly elected tribal council members against recent disenrollments and existing tribal council that refused to recognize the new members).

⁵⁸ Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-458bbb-2 (2006)).

⁵⁹ Pub. L. No. 95-608, 93 Stat. 3071 (1978) (codified at 25 U.S.C. §§ 1901-1963 (2006)).

⁶⁰ *See* *Montana v. United States*, 450 U.S. 544, 563–64 (1981) (noting tribes' dependent status is inconsistent with control of external relations, but that “the powers of self-government, including the power to prescribe and enforce criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.” (alteration in original) (quotation marks omitted)). The court went on to define internal relations as the “power to punish tribal offenders, . . . determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” *Id.*

⁶¹ Eric D. Lemont, *Introduction to AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 2* (Eric D. Lemont ed., 2006).

⁶² *Id.* at 3; EXEC. SESSION, *supra* note 57.

⁶³ Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in *AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 184, 186* (Eric D. Lemont ed., 2006); Lemont, *supra* note 61, at 12.

twenty-first century dynamics to the U.S. founders' need to rewrite the weak and ineffective Articles of Confederation.⁶⁴

Because tribes do not institute constitutional reforms on a blank slate, however, tribes also confront questions about the mechanisms through which reform can be achieved, as well as the design of effective mechanisms for future constitutional change. Tribes still draft constitutions alongside a BIA handbook that includes proposed provisions, format and content, and the BIA offers both informal and formal review processes throughout the drafting process.⁶⁵ Despite this, many tribes have engaged in reform processes that depart substantially from IRA and BIA boilerplate provisions, reflecting a broader renewal of contemporary self-governance.⁶⁶ At the same time, amendment and reform occurs against the backdrop of the constitutions' subnational status, attempting to govern a discrete population while dependent upon and responsive to a broader national government. These process questions—about the structural possibilities and limitations on tribal constitutional amendment and reform—will form the focus of the remainder of the paper.

III. APPROACHING TRIBAL CONSTITUTIONAL REWRITING: AMENDMENT AND REFORM

“[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished them, in their natural course, with those whose will gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution, then, and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force and not of right.”

—Thomas Jefferson, Letter to James Madison, September 6, 1789⁶⁷

“Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.”

—Great Law of the Iroquois⁶⁸

⁶⁴ Champagne, *supra* note 19, at 16.

⁶⁵ Resnik, *supra* note 5, at 714.

⁶⁶ The White Earth Nation constitutional reform process, which won membership approval in a November 2013 tribal referendum, offers a leading example of the dynamic and wholesale reform processes tribes are currently undertaking. The new constitution replaces an existing IRA-era constitution “that was forced on us by the U.S. government.” Terry Janis & Jill Doerfler, Educational Team Will Visit Communities, Host Seminar, White Earth Nation, http://www.whiteearth.com/programs/?page_id=515&program_id=24 (last visited Nov. 17, 2013). The tribe enlisted White Earth member and noted literary author and scholar Gerald Vizenor as lead writer for the proposed constitution, which engaged with indigenous literary traditions. Between 2007 and 2009, White Earth convened four constitutional conventions, where appointed delegates and interested tribal members discussed important tribal values, including respect, love, family and tolerance, and how those values could be used to “heal our nation.” Prior to the referendum, the Nation published summaries and explanations of the proposed changes in a tribal newspaper and on Facebook, hosted community education forums on- and off-reservation, and a day-long Constitution Seminar. *See id.*; Jill Doerfler, White Earth Reconvenes Constitutional Convention, ANISHINAABEG TODAY, Jan. 16, 2008, at 1; Lisa Brooks, *The Constitution of the White Earth Nation: A New Innovation in a Longstanding Indigenous Literary Tradition*, *Stud. in Am. Indian Literatures*, no. 4, Winter 2011, at 48. *See generally* JILL DOERFLER & GERALD VIZENOR, THE WHITE EARTH NATION: RATIFICATION OF A NATIVE DEMOCRATIC CONSTITUTION (2012).

⁶⁷ JEFFERSON: POLITICAL WRITINGS, CAMBRIDGE TEXTS IN THE HISTORY OF POLITICAL THOUGHT (Joyce Appleby and Terence Ball eds., 1999).

⁶⁸ The Constitution of the Iroquois Nations: The Great Binding Law, Indigenous People, <http://www.indigenouspeople.net/iroqcon.htm> (last updated Mar. 30, 2012).

This Part considers the scope and frequency of constitutional change as related to a constitution's location within a subnational structure and an important avenue for examining constitutional meaning. This Part contends that tribal constitutions have undergone the most frequent wholesale constitutional reform within the American constitutional structure. This fact is both a product of their subnational status and a reflection of tribal values and approaches to governance.

Subnational constitutionalism can be understood as a “two-tiered constitutional structure that establishes a superior state and a group of subordinate states that exercise overlapping control of a single population,” with both the superior state and the subordinate states having their own constitutions.⁶⁹ The subnational framework situates tribal constitutions within a dialogue between sovereign tribal nations and the federal system that has cast a long shadow over tribal self-governance. In doing so, this framework recognizes tribal constitutions, alongside the federal and state constitutions, as “interdependent features of a greater *American* constitutional structure,” with each “dependent upon, limited by, and to some extent the product of . . . our national constitutional environment.”⁷⁰

At any level of the national constitutional structure, the scope of constitutional change can be categorized into two basic approaches: amendment or reform. Amendment, or “ordinary constitutional reform,” involves small-scale adjustments designed to tackle specific problems, adding onto, and thereby preserving, existing governance documents.⁷¹ Reform, on the other hand, involves a “more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of [the] government or . . . public policy.”⁷²

A brief comparative analysis of constitutional change⁷³ reveals that tribes are the only force in the American constitutional structure still engaged in frequent reform. The United States Constitution has not experienced reform for well over 200 years.⁷⁴ Although new American state constitutions and constitutional conventions were commonplace in the nineteenth century, the twentieth century witnessed far fewer of both: only twenty-three new constitutions compared to ninety-four in the previous century.⁷⁵ Since 1984, that pace has ground to a halt—there has been only one new state

⁶⁹ Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1584 (2010). The subnational analogy is an imperfect one. See G. ALAN TARR, FEDERALISM, SUBNATIONAL CONSTITUTIONALISM AND THE PROTECTION OF MINORITY RIGHTS IN THE UNITED STATES 19 (2001), available at <http://camlaw.rutgers.edu/statecon/publications/aver2.pdf> (asserting that tribes are not component units in the U.S. federal system but rather “semi-autonomous entities”). However, as “domestic dependent nations” subject to Congressional plenary power, tribal sovereignty is clearly limited and structured by the federal superstate. *Id.*

⁷⁰ Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1805 (1992) (emphasis in original).

⁷¹ G. Alan Tarr, *Introduction* to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 1, 2 (G. Alan Tarr & Robert F. Williams eds., 2006).

⁷² *Id.*

⁷³ Scholarship on U.S. federal and state constitutions is deployed not as a substantive model for tribes existing in very different political, historical and geographic circumstances, but rather for comparative insight into the constitutional amendment and reform processes relevant to the current wave of tribal constitutional redrafting. Although acknowledging the important role of informal constitutional change, at least at the federal level—see, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 113–14 (1991) (discussing the New Deal Supreme Court's substantial interpretive rewriting of the Constitution)—this paper will confine itself to a comparison of formal constitutional change, although the Part on reform raises questions that involve interplay between the formal and the informal.

⁷⁴ This statement considers only formal constitutional reform. Informal, non-textual constitutional reform arguably occurred during the Civil War/Reconstruction and New Deal eras. Even still, federal constitutional reform remains far more infrequent than state and tribal iterations.

⁷⁵ Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1520 (2009).

constitution and no constitutional conventions.⁷⁶ Although statistics regarding tribal constitutions are difficult to compile, it is clear that dozens of tribes have adopted new constitutions or engaged in wholesale constitutional reform processes within the last twenty years.⁷⁷

In addition to the scope of constitutional change, the frequency of change also affects the interpretation and role of the founding document. The federal constitution's relative durability and unchanging nature fosters mystique as compared to state constitutions' frequent changes and detailed "constitutional legislation" provisions that are more on par with ordinary statutes.⁷⁸ Durable constitutions serving as the supreme law prevent temporary majorities from passing amendments that harm fundamental governing principles and also allow citizens to rely on a consistent form of government.⁷⁹ On the other hand, malleable constitutions more easily accommodate significant societal changes, including changes to population, economy, threats to sovereignty, and so forth.⁸⁰ Thus Jefferson's suggestion in a letter to Madison, quoted above, that constitutional provisions should sunset every nineteen years to allow a new generation of citizens to design a constitution appropriate to their contemporary context.

The pace of change to tribal constitutions more closely parallels that of state constitutions than that of the federal constitution and is consistent with the theory of subnational constitutions more generally.⁸¹ Since the adoption of the Bill of Rights, the United States Constitution has been amended less than once per decade, and the original document still governs.⁸² In contrast, only nineteen states still retain their original constitution, the majority of states have had three or more different constitutions, and Louisiana and Georgia have had eleven and ten iterations.⁸³ On average, state constitutions have 120 amendments.⁸⁴ Although the history of tribal constitutions is uneven, the Cherokee, for example, have had four different constitutions, and most tribes engaging in contemporary reform are adopting either their second or third constitution within the last seventy-five years.⁸⁵

Thus, tribal constitutional change occurs at both greater scope and frequency compared to the federal or state models. The federal model has tended to avoid formal reform in favor of informal constitutional changes outside the document as well as the occasional amendment, while states have

⁷⁶ *Id.*

⁷⁷ Recent examples of tribes undertaking wholesale constitutional reform include the Chickasaw (1990), Pala Band of Mission Indians (1997), Eastern Shawnee Tribe of Oklahoma (1999), Crow (2001), Turtle Mountain Band of Chippewa (2001), Cherokee (2003), Osage (2006), Citizen Potawatomi Nation (2007), Ho-Chunk Nation (2007), White Earth Nation (2007), Gila River Indian Community (2009), and Eastern Band of Cherokee (2011).

⁷⁸ Ginsburg and Posner posit that subnational constitutions' systematic disposition in favor of constitutional reform and amendment suggest that subconstitutions are closer to ordinary statutes than are superstate constitutions. Ginsburg & Posner, *supra* note 69, at 1600–01.

⁷⁹ Cain & Noll, *supra* note 75, at 1517–18.

⁸⁰ *Id.* at 1518.

⁸¹ See, e.g., Ginsburg & Posner, *supra* note 69, at 1599–1601 (proposing that subconstitutions weaken their amendment procedures because separation of powers and rights are guaranteed at the federal level and reporting that no subconstitutional system is more difficult to amend than the constitution of its super-state).

⁸² G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23 (1998).

⁸³ *Id.* at 22, 24.

⁸⁴ *Id.* at 24.

⁸⁵ See, e.g., D. Jay Hannah, *The 1999 Constitution Convention of the Cherokee Nation*, 35 ARIZ. ST. L. J. 1, 3–6 (2003) (describing constitutions drafted by the Cherokees in 1827, 1839, 1976, and 1999); David J. Carlson, *Trickster Hermeneutics and the Postindian Reader: Gerald Vizenor's Constitutional Praxis*, STUD. IN AM. INDIAN LITERATURES, Winter 2011, at 13, 26 (comparing new Constitution of the White Earth Nation with earlier IRA-era Revised Constitution and Bylaws of the Minnesota Chippewa Tribe); Clarkson, *supra* note 25, at 487 n.87 (describing the approval of Choctaw's 1983 Constitution, its third following a 1979 Constitution and its original 1860 Constitution, after a 1976 district court decision affirmed the continuing validity of the first Constitution, permitting renewed self-government).

eschewed large-scale reform in favor of specific constitutional amendments. Clearly, tribal constitutions' subnational status impacts this tendency: major rights of tribal members are guaranteed by federal statutes; the limited powers of tribal governance tend to make tribal constitutions resemble ordinary legislation, filling in the details where larger structural issues are determined elsewhere; and tribes must navigate the formal (IRA) and informal (lure of benefits, need for legitimacy, advantages of organized structure to interact with the federal government) pressures exerted by the super-state.

A. Amendment

“[T]o me it seems not very important exactly what constitution you adopt to begin with because you can always improve it. You can improve it twice a year if you want to. The thing to do is to get organized.”

— John Collier, Commissioner of the Bureau of Indian Affairs (1933-45), urging passage of the Oglala Sioux Constitution despite opposition to its substance⁸⁶

1. Ease of Amendment

Many tribal constitutions specify relatively easy amendment procedures, commonly featuring a majority approval requirement and multiple routes to propose an amendment, including voter initiatives.⁸⁷ This ease is consistent with the BIA's standard amendment provision, subnational constitutional theory, and historical accident from the era of IRA constitution drafting.

The BIA's current standard amendment provision⁸⁸ recommends:

- An amendment proposed by a majority of Tribal Council members or through a petition signed by at least 30% of qualified voters⁸⁹
- A majority vote of qualified voters at a special election called by the Secretary of the Interior⁹⁰

⁸⁶ BIOUSI, *supra* note 34, at 96.

⁸⁷ See, e.g., ROSEBUD SIOUX TRIBE CONST. art. IX, § 1 (majority approval requirement for qualified voters to approve amendment); *id.* § 2 (providing that petition signed by 30% of voters in the last election results in Tribal Constitution Convention to consider amendments); MOHEGAN TRIBE CONST. art. XVII (providing for majority vote requirement to amend constitution so long as 30% of registered voters participate); *id.* art. X, § 2 (k) & (l) (empowering Council of Elders to recommend and place constitutional amendments to vote); *id.* art. XII, § 2 (creating petition procedure for 40% of registered voters to propose amendments).

⁸⁸ BUREAU OF INDIAN AFFAIRS, SAMPLE CONSTITUTION OF THE EXAMPLE TRIBE, available at <http://www.bia.gov/cs/groups/public/documents/text/idc-001884.pdf>.

⁸⁹ Variations include CAMP McDOWELL INDIANS OF ARIZ. CONST. art. IV, § 1 (Amendment proposal by 2/3 of qualified Indian voters on reservation or unanimous vote of five-member council); CHICKASAW NATION CONST. art. XVIII, § 1 (initiative requires 20% of voter support); BLACKFEET TRIBE CONST. art. X (amendment proposal requires 2/3 of council or 1/3 of qualified voters); CHEYENNE-ARAPAHO TRIBES OF OKLA. CONST. art. XIII (no provision for voter initiative, only the tribal council may propose amendments); S. UTE INDIAN TRIBE CONST. art. XII, § 1 (initiative requires only 20% of voters); CHOCTAW NATION CONST. art. XVIII, § 1 (requiring votes of eight of twelve tribal council members to propose amendments).

⁹⁰ Variations include CHOCTAW NATION CONST. art. XVIII, § 2 (requiring 51% approval of total number of qualified voters at last election and no separate minimum participation requirement); NEZ PERCE TRIBE CONST. art. IX, § 1 (requiring 2/3 approval at referendum); White Earth Nation Constitution, ch. 20 (requiring 2/3 of recorded eligible votes in an election or referendum to amend Constitution), available at http://www.whiteearth.com/data/upfiles/files/Proposed_White_Earth_constitution_2.pdf. A number of pre-IRA constitutions provided an amendment approval procedure through regular meetings of legislative bodies. A pre-IRA Constitution of the Turtle Mountain Band of Chippewa Indians did not submit constitutional amendments for direct vote; instead, they could be proposed and approved at any regular meeting of the advisory committee or tribal council. TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS CONST. OF 1932 art. VI, § 1. Similarly, the Oglala Sioux Tribe empowered the tribal council of forty delegates to amend the Constitution by a majority vote at any regular council meeting so long as the proposed amendment was filed with thirty days notice. OGLALA SIOUX TRIBE CONST. OF 1933 art. VIII.

- Participation of at least 30% of eligible voters in the special election⁹¹
- Approval by the Secretary of the Interior

The core of these provisions—allowing proposals through majority legislative agreement or popular initiative and majority approval through referendums—place the constitutional amendment process of most tribes much closer to state constitutional models than the federal constitution.⁹² If tribal constitutions experienced a correlation between the flexibility and frequency of amendments⁹³—i.e. tribal constitutions are amended frequently because it is relatively easy to do so—amendments to tribal constitutions would be substantial. The ease of state constitutional amendment has resulted in the average state constitution featuring 120 amendments.⁹⁴

Tribes' constitutional requirements for amendment resemble ordinary legislation more than either the federal or state constitutional models. Many tribes require only a majority of tribal council members to propose an amendment—no different than the consensus required for passage of a tribal council ordinance.⁹⁵ Most states (twenty-seven) impose a supermajority requirement on their state legislatures for amendment proposals.⁹⁶ This tribal constitutional proximity to ordinary legislation remains consistent with a theory of dependent sovereignty where the superstate's constitutional or plenary authority over the subconstitution limits the latter's incentives to protect rights, resulting in lowered amendment requirements.⁹⁷

Both tribal constitutions and state constitutions heavily employ direct participation as a mechanism to initiate and approve constitutional amendments, increasing the ease of amendment not

⁹¹ Not all tribes impose a minimum participation requirement or one counted by percentage. *See, e.g.*, CHEROKEE CONST. art. XV, § 2 (amendment valid as long as simple majority met); NEZ PERCE TRIBE CONST. art IX, § 1 (requiring not less than 100 votes cast out of a tribal population of 2,700).

⁹² Of course, the federal Article V amendment process does not involve the direct participation of voters in either the proposal or approval process, leaving either Congress or state legislatures to propose an amendment and state legislatures or state conventions to approve them. Moreover, Article V requires the consent of either 2/3 of both the House and the Senate or 2/3 of state legislatures just to propose an amendment; an extraordinary 3/4 of the state bodies must consent to approve one. No other provision in the United States Constitution imposes such a high requirement for consent, even though the Constitution significantly lowered the consent requirement from the unanimity that the Articles of Confederation required, ultimately leading to its downfall. *See* AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 285–86 (2005).

⁹³ TARR, *supra* note 82, at 141 n.22.

⁹⁴ *Id.* at 10, 24.

⁹⁵ *See, e.g.*, CHEYENNE-ARAPAHO TRIBES OF OKLA. CONST. art. XIII(1)(a) (permitting Legislature to amend Constitution by “calling a Special Election by law”); *id.* art. VI(7)(a)(iii) (“All decisions of the Legislature shall be made by a majority vote of the Legislators present unless otherwise specified in this Constitution”); S. UTE INDIAN TRIBE CONST. art. XII, § 1 (providing election for constitutional amendment with votes of four of seven tribal council members); GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS CONST. art. XV, § 2 (requiring election for constitutional amendment upon request of Tribal Council, with Tribal Council action requiring only majority vote).

⁹⁶ Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1641 (2010). Most states imposing a supermajority requirement for legislative amendment proposal follow the U.S. Constitution's 2/3 model (eighteen states), followed by nine states requiring 3/5 approval and four states involving hybrid schemes with both supermajority and majority requirements. On the other hand, most tribal constitutions' initiative requirement of 20-33% of eligible voters remains substantially higher than most states, where 8-10% is more common. *See, e.g.*, CAL. CONST. art. II, § 8b (8% initiative requirement); OR. CONST. art. IV, § 21(c) (8% initiative requirement); NEV. CONST. art. XIX, § 2, cl. 2 (10% initiative requirement).

⁹⁷ *See* Ginsburg & Posner, *supra* note 69, at 1608 (predicting that federal government monitoring of states has reduced since incorporation of the Bill of Rights, leading to an increase in state constitutional amendments enacted by interest groups). Of course, Indian tribes have not experienced incorporation. Empirical studies on the links between laws such as the Indian Civil Rights Act of 1968 (guaranteeing most constitutional rights to the tribes, although largely enforced by tribal rather than federal courts) and tribal constitutional reform are necessary.

only because of the availability of a second path for amendment outside of action by elected officials but also because of the pressure exerted on the legislative body to initiate change itself.⁹⁸ The use of direct participation might result from a historical accident: states widely transformed their constitutions during the Progressive era, where direct democracy measures and the push for economic, political and social reform through constitutional amendments became commonplace.⁹⁹ IRA constitutions were drafted shortly after this period. Consider that three consecutive amendments to the United States Constitution at the end of the Progressive era all incorporated direct voter election: Amendment XVII's Direct Senate Election Amendment (1913),¹⁰⁰ Prohibition Amendment XVIII's requirement of re-ratification within seven years (1919),¹⁰¹ and Amendment XIX's extension of suffrage to women (1920).¹⁰²

Tribal constitutions share with state constitutions the broad use of voter initiative and referendum mechanisms. Twenty states amended their constitutions between 1898 and 1918 to provide for voter initiatives that propose constitutional amendments.¹⁰³ Even prior to constitutional proposals by initiative, state constitutional amendments were widely approved by referendum since the early nineteenth century, and popular approval became the rule by the 1830's.¹⁰⁴ Today, all states except Delaware continue this practice.¹⁰⁵ Like the dominant tribal model, forty-four states require only a simple majority of referendum voters for approval.¹⁰⁶

2. Administrative Approval

Despite the similarity in the *procedures* of amendment that would seem to suggest frequent and numerous constitutional amendments, many tribal constitutions face an additional level of approval making them markedly different from state constitutions.¹⁰⁷ Approval by the Secretary of the Interior currently serves as a major impediment to tribal self-determination.¹⁰⁸ The element of federal administrative approval suggests that, within the American constitutional structure, tribal constitutions experience the most limitations on sovereign constitutional development and reflect deep interdependence with the super-state.

⁹⁸ WALTER DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 292 (1910) ("Perhaps the greatest value which the initiative will have is not in the direct results which may come from its use, but in its influence in causing legislatures to act upon matters upon which action is desired by the people.").

⁹⁹ Devins, *supra* note 96, at 1643.

¹⁰⁰ Interestingly, the origins of the federal Direct Senate Election Amendment were decidedly western, based largely on the state of Oregon's plan to allow voters in the general election to express their preference for the United States Senator of their choice and allowing state legislators first to pledge to support the direct result, and later requiring them to do so through a 1908 state initiative. *See* AMAR, *supra* note 92, at 411.

¹⁰¹ *See id.* at 417–19 (noting Amendment XVIII, section 3's definition of "operative" laid the groundwork for a potential future move towards a more directly democratic system of amendment).

¹⁰² *See id.* at 419 (noting this amendment constituted the "single biggest democratic event in American history" in sheer numbers).

¹⁰³ Devins, *supra* note 96, at 1643.

¹⁰⁴ DODD, *supra* note 98, at 64–65.

¹⁰⁵ TARR, *supra* note 82, at 26.

¹⁰⁶ *Id.* at 34.

¹⁰⁷ The exception would be federal checks on state constitutions upon statehood and federal constitutional review of state constitutional amendments under the 14th Amendment. *See* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004) (tracking the federal government's influence on state constitutions as states rejoined the Union after the Civil War).

¹⁰⁸ *See, e.g.,* Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 KAN. L. REV. 437, 448 (2002) (discussing BIA refusal to sponsor an election for the proposed constitutional amendment of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians that would have altered membership requirements from a blood quantum requirement to ancestry).

Although the Secretary must call a special election for tribal members when the constitutional requirements for proposing an amendment are met,¹⁰⁹ he may reject any amendment “contrary to applicable law.”¹¹⁰ The Bureau of Indian Affairs has also reserved the right to reject amendment provisions that are “inappropriate,” including those that do not conform to Bureau policies.¹¹¹ Moreover, in the case of conflicting amendment proposals, the Secretary must call an election for the proposal “first received by the officer in charge” if it is found “valid.”¹¹² Thus, the Secretary retains discretion to reject amendments based on an undefined declaration of “validity,” and acts as referee when tribal governance disputes yield conflicting constitutional change. The Secretary also retains discretion when tribal procedures do not offer a clear resolution. For example, if the amendment provisions of a tribal constitution become “outdated” such that “amendment cannot be effected pursuant to them,” the Secretary “may” nonetheless authorize an election at the request of the tribal government.¹¹³

a. Case Study: Secretarial Approval and the 2003 Cherokee Constitution

The 1999-2003 Cherokee constitutional reform process illustrates the deep subconstitutional status of tribes with a Secretarial approval requirement: the requirement served as both a desirable mechanism to enable self-governance and a hindrance to sovereign constitutionalism. The 1975 Cherokee Nation Constitution—the first since the federal government disallowed Cherokee self-governance in 1907—voluntarily included a provision requiring federal approval for future constitutional changes. The Cherokee constitutional drafters believed the approval provision would facilitate the limited sovereignty it possessed by obtaining further government support; constitutional reformers were motivated by the possibility of federal funding,¹¹⁴ and thus they designed substantive provisions, such as a unicameral legislature and internal judiciary, to ensure quick receipt and disbursement of federal funds and to improve the delivery of services to individual tribal members.¹¹⁵

When the Cherokee voters approved a new constitution in 1999, the amendment provision ultimately delayed the implementation of the new Constitution, and the federal government has not yet recognized the new Constitution.¹¹⁶ After the BIA expressed disapproval with several provisions of the new constitution and mandated specific changes, the Cherokee Nation instead submitted a constitutional

¹⁰⁹ 25 C.F.R. § 81.5(d) (2011) (“The Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents.”).

¹¹⁰ Congress, in 1988 amendments to the IRA, limited the Secretary’s discretion during the approval process by (1) setting a forty-five-day time limit for secretarial authorization for a constitutional referendum or for approval of a ratified amendment and (2) limiting the Secretary’s discretion by mandating approval of an amendment unless “contrary to applicable laws.” See FLETCHER, *supra* note 55, at 155. However, this provision restores the centrality of federal government action—treaties, executive orders, acts of Congress or court decisions—to limit the ability of tribes to amend their constitutions.

¹¹¹ KIRSTY GOVER, *TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP* 119-120 (Oxford Univ. Press 1st ed. 2011).

¹¹² 25 C.F.R. § 81.5(g) (2011).

¹¹³ 25 C.F.R. § 81.5(e) (2011).

¹¹⁴ Lemont, *supra* note 26, at 7 n.14 (“[Cherokee Leader Ross] Swimmer said that in Eastern Oklahoma: A lot of federal help was being given to tribes in the west, but none in Oklahoma, because again we didn’t have organized tribes. This was also an impetus, a big impetus, for the adoption of a constitution . . . I saw this opportunity with the federal money that was coming in that we could use that and turn it into a useful tool that we could do some things in Eastern Oklahoma.”)

¹¹⁵ *Id.* at 9.

¹¹⁶ *Id.* at 32.

amendment to the voters removing the Secretarial approval provision of the 1975 Constitution, which the voters approved.¹¹⁷ Despite continued BIA opposition to the measure, in 2006 the Cherokee Nation Supreme Court affirmed that voters had validly removed the approval provision and declared the 2003 constitution in full force.¹¹⁸ Although an administration change resulted in later secretarial approval of the amendment, a 2011 BIA opinion declared that the approval was not “retroactive,” and thus the new constitution was not valid since voter ratification preceded the constitutional amendment.¹¹⁹

Presumably, the Cherokee could have merely re-submitted the constitution to its voters for re-ratification. But when the ratification issue became intertwined with federal disagreement about a separate constitutional amendment disenrolling Cherokee Freedmen, and the U.S. Department of Housing and Urban Development suspended \$33 million in Cherokee Nation funds, the Cherokee settled outside of the constitutional framework.¹²⁰ Perhaps more than the secretarial approval provision, the Nation’s annual receipt of \$500 million in federal funding serves to limit the Cherokee’s ability to fully amend its constitution as it, for better or worse, sees fit.¹²¹

However, like the Cherokee, a number of tribes have amended their constitutions to remove BIA approval power, which the BIA has tended to accept.¹²² Although federal legislation delegating power to the Secretary to adopt and approve tribal constitutions provides that tribes may adopt amendments through any other method pursuant to their inherent sovereign authority,¹²³ such constitutions will not be “recognized” by the BIA. This raises the possibility of increased BIA opposition to tribal government actions, issues arising during the distribution of federal benefits, and the inability to claim federal preemption against state intrusion into tribal governments.¹²⁴

b. Subnational Similarities: Federal Approval of State Constitutions

Secretarial approval of tribal constitutions is similar to the requirement of initial Congressional approval of state constitutions, reflecting a broader characteristic of subnational constitutionalism. As such, infringement on tribal sovereignty to rewrite their constitutions reflects not just the continuation of a tribe’s domestic dependent status, but rather a practice shared by constitutional governments operating within federal schemes, including states, territories, and tribes. For example, prior to state admission, Congress and the President review constitutional provisions and can refuse to admit the state until desired constitutional changes are made.¹²⁵ Awareness of this requirement tends to deter states from drafting constitutional provisions likely to upset federal power.¹²⁶ Unlike tribes, federal restrictions are

¹¹⁷ *Id.* at 31.

¹¹⁸ *In re Status and Implementation of the 1999 Constitution of the Cherokee Nation*, Judicial Appeals Tribunal of the Cherokee Nation (June 7, 2006), available at <http://www.cornsilks.com/99con.pdf>.

¹¹⁹ Bureau of Indian Affairs, Letter from Larry Echo Hawk, Assistant Secretary—Indian Affairs (September 9, 2011), available at [http://www.cherokee.org/Portals/0/Documents/2011/9/32697Cherokee_9_9_11_\(3\).pdf](http://www.cherokee.org/Portals/0/Documents/2011/9/32697Cherokee_9_9_11_(3).pdf).

¹²⁰ Steve Olafson, *Cherokee Tribe Retreats from Effort to Oust Some Members*, REUTERS (Sept. 15, 2011, 2:26 PM), <http://www.reuters.com/article/2011/09/15/us-usa-cherokees-idUSTRE78E5IX20110915>.

¹²¹ *Cherokee Nation Chief Mindful of Funding in Freedmen Dispute*, INDIANZ.COM (Nov. 8, 2011), <http://www.indianz.com/News/2011/003661.asp> (quoting the Cherokee Nation chief’s resolve to defend the \$500 million in federal funding received annually by the Nation that had been threatened by the Obama administration during the Freedmen dispute).

¹²² FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 65 (1995).

¹²³ 25 U.S.C. § 476(a) (2011).

¹²⁴ Resnik, *supra* note 5, at 713 n.189.

¹²⁵ TARR, *supra* note 82, at 40.

¹²⁶ *Id.*

removed upon statehood, and states have historically incorporated previously offending provisions after receiving such status.¹²⁷

More dramatic federal restrictions on subnational constitution reform have occurred during extraordinary historical moments; for example, during Reconstruction, one commentator (correctly) predicted that newly adopted Southern state constitutions would “last just as long as the bayonets which ushered them into being, shall keep them in existence, and not one day longer.”¹²⁸ At times, federal restrictions on tribes have gone further, abolishing tribal self-governance altogether.¹²⁹ Currently, however, tribal authority to remove the BIA approval provisions—even if informal pressures accompanying federal supervision counsel against doing so—renders tribal constitutions more sovereign than their subnational counterparts in South Africa, where provincial constitutions cannot take effect until judicial review for compliance with thirty-four principles enunciated in the federal constitution.¹³⁰ In short, both the ease of *and* restrictions on tribal constitutional amendment situate tribes within a unique subnational status, characteristics that have historically shifted along with a tribe’s sovereign powers.

B. Reform

Beyond the relatively easy amendment procedures and Secretarial approval requirement, tribes seeking constitutional change face the limiting nature of an outdated original framework. Whether an existing IRA-era constitution is considered imposed by outsiders or unfit for the times, tribes have often foregone amendments to existing constitutions in favor of wholesale reform. Amendments are typically appropriate for correcting “specific problems” in documents, but are unlikely to consider questions of broader constitutional design.¹³¹ Moreover, because the specific nature of amendments compounds the specific nature of tribal constitutions, frequent amendment creates “a language and provision multiplier effect.”¹³² For example, prior to constitutional reform on the Turtle Mountain Reservation, tribal members viewed the frequency of constitutional amendment as reflecting a valuable commitment to constitutionalism but leaving a “patchwork quilt” indicating that constitutional reform, not merely amendment, was necessary.¹³³

Of course, the federal Constitution’s patchwork nature has not necessarily been viewed as problematic. For example, Akhil Reed Amar has discussed the benefits of the document’s reflection of national historical developments over more than two hundred years.¹³⁴ Moreover, states used to engage in frequent wholesale constitutional reform, but recently amendments have become a more commonplace method for state reformers, leaving tribes as the units most frequently engaged in subnational constitutional reform in the United States.¹³⁵

¹²⁷ *Id.* at 41.

¹²⁸ *Id.* at 131.

¹²⁹ *See supra* note 28.

¹³⁰ *See supra* text accompanying note 16.

¹³¹ Tarr, *supra* note 71, at 6.

¹³² Cain & Noll, *supra* note 75, at 1520 (discussing in state constitution context).

¹³³ *See* Richotte, *supra* note 27 (noting members’ view on the tribe’s nine different amendments since 1959).

¹³⁴ AMAR, *supra* note 92, at 458–63 (noting the chronological order of Amendment text “has happily encouraged the Constitution’s readers to attend to the document’s history and trend line [Without chronological ordering], this strong vector [towards increasing democracy] would have been less visible.”).

¹³⁵ Devins, *supra* note 96, at 1640–41 (“[T]he principal mechanism by which states now update their constitutions is the amendment process . . .”).

Tribes often do not know the path to constitutional change prior to the start of the reform process. When the Cherokee Nation began constitutional reform in 1999, neither the authorizing tribal council nor the independent Cherokee Nation Constitution Commission had imagined the end product. Some reformers envisioned a series of amendments to the existing 1975 Constitution, as the idea of wholesale reform sparked significant opposition.¹³⁶ However, following a series of twenty public hearings, reformers recognized that the breadth and quantity of desired change could not be achieved in a series of amendments. The Nation's General Counsel worried that a new constitution would create a "big target" for those opposed to reform, and a Cherokee Supreme Court Justice expressed concern about the loss of precedential value from case law based on the old constitution.¹³⁷ Nonetheless, the Commission chose to draft a new constitution using public comments from the hearings as a starting point.¹³⁸

1. Understanding the Challenges of Reform: The Cherokee Constitutional Convention and Reform Process of 1999-2003

The Cherokee Constitutional Convention and Reform Process of 1999-2003 provides a useful opportunity for understanding the processes and challenges of wholesale constitutional reform among American Indian tribes, both because it has been extensively documented¹³⁹ and because it reflects the limitations under which tribal constitution reform can take place. As discussed above, despite the Cherokee members' ratification of the new constitution in 2003, the federal government has yet to recognize it and insists the Cherokee are operating under the previous 1975 constitution.¹⁴⁰ As such, the reform process highlights tribal constitutions' interdependent status with the federal system, even as tribes discard IRA-era constitutions due to the taint of federal authorship and control.¹⁴¹

Tribal constitutional reform tends to operate outside of any pre-existing framework. Although most tribal constitutions contain provisions for amendment similar to the BIA model, few contain detailed provisions for wholesale constitutional reform.¹⁴² Some discuss the procedure for calling a constitutional convention, although procedures for selecting delegates, operating the convention, or ratifying the resulting document are rarely defined.¹⁴³

Nonetheless, common issues facing tribal reformers have been identified, including the role of existing tribal government officials in the reform process, the scale of reform, and the tendency for contentious issues—especially blood quantum and membership requirements—to derail reform projects.

¹³⁶ Lemont, *supra* note 26, at 29.

¹³⁷ *Id.*

¹³⁸ *Id.* at 16.

¹³⁹ Archives from the Cherokee Nation Constitutional Commission are available at, <http://www.cherokee.org/OurGovernment/Commissions/ConstitutionConvention.aspx>.

¹⁴⁰ See Bureau of Indian Affairs, *supra* note 119.

¹⁴¹ Devins, *supra* note 96, at 1640–41 (noting that only Georgia has adopted a new constitution in last 30 years and that two-thirds of states have constitutions that are more than 100 years old); Cain & Noll, *supra* note 75, at 1520 (noting the continued high pace of state constitutional amendments compared to the decline of state constitutional conventions and new constitutions).

¹⁴² Champagne, *supra* note 19, at 30–31; Steven Haberfeld, *The Process of Constitutional Reform*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 252, 253 (Eric D. Lemont ed., 2006).

¹⁴³ See, e.g., ROSEBUD SIOUX TRIBE CONST. art. IX, § 2 (providing that petition signed by 30% of voters in the last election results in the Tribal Constitution Convention to consider amendments, conducted by a seven-person Tribal Constitutional Task Force consisting of tribal members outside the Tribal Council); CHEROKEE NATION CONST. art. XV, § 9 (empowering tribal members to call a constitutional convention by referendum and prohibiting the Tribal Council from calling a convention; requiring majority approval for any resulting constitutional changes; and requiring submission of questions of constitutional convention to voters once every twenty years).

Despite their subnational status, tribal constitutions' stance on these founding decisions affects both the scope and authority of the tribe itself, confronting issues central to constitutional meaning.

First, defining the respective authority of existing tribal government officials and tribal members ensures endorsement, deters obstructionism from existing officials, and encourages genuine buy-in from the people.¹⁴⁴ The Cherokee reform process seemingly managed to accomplish these feats despite a major intra-branch dispute, the tribal council approving a Constitutional Convention whose suggestions would be mandatory rather than advisory, and a Constitutional Commission that remained independent from the existing government by receiving guarantees of equal representation for each of the three branches of government.¹⁴⁵ The independent Constitutional Commission agreed to take an oath of political neutrality, pledged not to hold public office, and agreed to act only with unanimity.¹⁴⁶ At the same time, the Cherokee held a wide-ranging series of around twenty public hearings for all members who wished to voice concerns that should be embodied in constitutional reform.¹⁴⁷ Following the hearings, the Commission held a nine day Constitutional Convention with seventy-nine delegates, including existing government officials and many tribal members chosen solely on the basis of their participation in the public hearings.¹⁴⁸

Other tribes have had constitutional reform processes derailed entirely because of association with the existing tribal government. A 2002 reform effort among the Turtle Mountain Tribe ultimately was rejected by its members because the referendum occurred at a time of growing distrust of the tribal council and became equated with a vote against the tribal council chairman rather than a vote on the constitution.¹⁴⁹ The failure of other tribal reform efforts attributable to dominance by existing officials include the Oglala Sioux Tribe and the Wampanoag Tribe of Gay Head/Aquinnah, where frequent constitutional changes occurred based on the short-term interests of the community as determined by the tribal council.¹⁵⁰

Second, tribal constitutional reform can become delayed or derailed when determining necessary preconditions to reform, such as defining eligible reform participants. The Cherokee Nation successfully handled this issue with respect to off-reservation Cherokees through a series of off-reservation public hearings and invitations to off-reservation convention delegates. These actions eventually culminated in a constitutional provision allotting two at-large seats in the tribal council for representation of off-reservation members and enhanced the legitimacy of the resulting constitution among a substantial portion of the Cherokee population.¹⁵¹ However, they were less successful in the context of Cherokee Freedmen. Prior to BIA approval of the new Cherokee constitution, the tribal council passed a referendum excluding Freedmen from tribal membership, which contributed to the federal government's

¹⁴⁴ Haberfeld, *supra* note 142, at 257–62 (suggesting tribal constitutional reform has generally proceeded along two models: the most common “technical” route where attorneys or other experts draft a proposed constitution and then submit to the people for feedback, and a “political” route where public discussions and solutions informs the initial drafting of a new constitution).

¹⁴⁵ Lemont, *supra* note 26, at 11–14.

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.* at 15.

¹⁴⁸ *Id.* at 16–17.

¹⁴⁹ See Richotte, *supra* note 27.

¹⁵⁰ Theresa Two Bulls, *Firsthand Accounts: Maximizing Citizen Participation and Ownership in Reform Processes*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 281, 282 (Eric D. Lemont ed., 2006); Beverly Wright, *Firsthand Accounts: Maximizing Citizen Participation and Ownership in Reform Processes*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 272, 274 (Eric D. Lemont ed., 2006).

¹⁵¹ Lemont, *supra* note 26, at 24–25.

failure to recognize the new constitution. Other tribes' reform processes can highlight existing grievances among the community when constitutionalizing existing practices for the first time.¹⁵²

The crises facing tribal governments today reflect a shifting moment in their sovereign status, a moment that has been viewed as an opportunity for significant constitutional reform. Within and responsive to the constraints of their subconstitutional status, tribes are freed to undertake the "higher lawmaking" of public deliberation conducive to constitution building.¹⁵³ The Cherokee reform process illustrates this, as the convention occurred against the backdrop of dueling governments with two courts, two police forces, a tribal council that had stopped conducting business for more than a year, and an FBI investigation into the Principal Chief.¹⁵⁴ Like the threat of an ineffective decentralized confederation or state secession, tribes facing governance crises are best positioned to craft new founding documents that last for generations, or, more likely, reflect *this* particular moment in tribal self-government.

IV. CONCLUSION: REFORM EVERY TWENTY YEARS

This Essay has proposed that Indian tribal constitutions should be understood in their subnational context. The establishment of tribal governance systems under the federal government and alongside state governments affects multiple aspects of tribal constitutions' writing and rewriting, such as the relative ease of amendment tempered by a federal approval requirement. It also helps to illuminate the continuing role federal oversight plays to structure tribal constitutions despite being well past the IRA era's boilerplate pressures. The Cherokee reform process demonstrates that, even in a time of wholesale constitutional reform empowered by expanding tribal economic and governmental self-determination, federal authority—through both the stick of Secretarial approval and the carrot of funding—continues to shape tribal constitutional decisions.¹⁵⁵

¹⁵² See Kelly Koepke, *New Residency Requirement Targets Non-Members, Angers Pueblo of Isleta*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 9, 2012), <http://indiancountrytodaymedianetwork.com/2012/04/09/new-residency-requirement-targets-nonmembers-angers-pueblo-of-isleta-107140> (noting the provision requiring criminal background check for nonmembers to live on reservations might be unusual in terms of its written nature, but the practice is not: "Lots of tribes are asking people to leave, especially when people bring in boys and girls dealing with drugs . . . Most tribes don't have these kind of ordinances written into laws, though—they are more traditional tribes without constitutions." (internal quotations omitted)).

¹⁵³ See generally ACKERMAN, *supra* note 73 (chronicling the development of the United States Constitution and federal structure).

¹⁵⁴ Lemont, *supra* note 26, at 2.

¹⁵⁵ Any loss of federal funding threatens essential services provided by federally recognized Indian tribes, as experienced by tribes during the fiscal year 2013 sequestration and the October 2013 government shutdown. See, e.g., NAT'L CONG. OF AM. INDIANS, TRIBES URGE CONGRESS TO HONOR TREATY PROMISES AND STOP SEQUESTRATION (2013), available at http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/2013.09.18_Treaty_Promises_Updated_Sequestration_Paper_revised_copy.pdf (describing sequestration cutbacks of more than \$500 million to federal programs in Indian Country, including impacts to education, essential government services, public safety and health care); Dan Frosch, *Pulling Aid Away, Shutdown Deepens Indians' Distress*, N.Y. TIMES (Oct. 13, 2013), http://www.nytimes.com/2013/10/14/us/pulling-aid-away-shutdown-deepens-indians-distress.html?_r=0 (describing effects of government shutdown on Indian tribes, including furloughs, the lack of bus service and home health services for sick tribal members, and the halting of funding to tribal governments). Funding through the Bureau of Indian Affairs supports 183 schools and dormitories, thirty-three tribal colleges and "social services, natural resources management, economic development, law enforcement and detention services, administration of tribal courts, implementation of land and water claim settlements, replacement and repair of schools, repair and maintenance of roads and bridges, repair of structural deficiencies on high hazard dams, and land consolidation activities." U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION: FISCAL YEAR 2014 IA-GS-2, available at <http://www.bia.gov/cs/groups/xocfo/documents/text/idc1-021730.pdf>. The total allocation to services through Indian Affairs in FY2012 was \$2.75 billion dollars. *Id.* at IA-OVW-1.

However, this Essay has also proposed that constitutional borrowing and influences between tribes and other entities are not unidirectional. Both the Cherokee Nation Constitution and the State of Oklahoma's Constitution include a provision requiring voters to consider whether to call a constitutional convention at least once every twenty years:

No convention shall be called by the Council to propose a new Constitution, unless the law providing for such convention shall first be approved by the People on a referendum vote at a regular or special election. Any amendments, alterations, revisions or new Constitution, proposed by such convention, shall be submitted to the registered voters of the Cherokee Nation at a general or special election and be approved by a majority of the registered voters voting thereon before the same shall become effective. The question of such proposed convention shall be submitted to the citizens of the Cherokee Nation at least once every twenty (20) years.¹⁵⁶

Aligned with Jefferson's warning about the inappropriateness of long-term constitutional documents that bind future generations, the provision requires members to consider the desirability of major constitutional reform at least once every twenty years, although it does not specify exactly when.

While this could be a simple case of the tribe borrowing from the state, the example is more complicated. The Oklahoma state constitutional delegation included representatives from Oklahoma's "Five Civilized Tribes," including the Principal Chief of the Cherokee. Shortly before the Oklahoma convention, these delegates had participated in the Sequoyah Constitutional Convention as part of the Indian Territory's attempts to gain its own statehood.¹⁵⁷ The Convention produced a constitution overwhelmingly ratified by territory voters, but Congress expressed little enthusiasm for an Indian state and instead supported joint statehood through Oklahoma. As a result, various principles and structures embodied in the Sequoyah Constitution found their way into the Oklahoma constitution.¹⁵⁸

As the Twenty Year Provision suggests, although tribes rewrite their constitutions under a subnational backdrop, they also actively participate in a dialogue that not only resolves internal tribal questions—arranging those limited sets of powers Congress and the Supreme Court have found "appropriate" for tribes to retain—but also engages with other subnational entities (i.e. states) and the federal system itself. Tribal constitution rewriting remains an inevitably subordinated enterprise, with or without the pressures of IRA boilerplate and field agents, but also an enterprise that possesses the opportunity to shift the landscape of the American constitutional structure itself.

¹⁵⁶ CHEROKEE NATION CONST. art. XV, § 9; *see also* OKLA. CONST. art. XXIV, § 2. Besides Oklahoma, 13 other states require the legislature to periodically submit the calling of a convention to the people. TARR, *supra* note 82, at 25. The practice originated with New Hampshire's 1784 Constitution. DODD, *supra* note 98, at 50.

¹⁵⁷ *See* AMOS D. MAXWELL, THE SEQUOYAH CONSTITUTIONAL CONVENTION (1953).

¹⁵⁸ David E. Wilkins, *Constitution of the State of Sequoyah*, in DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933 299, 299 (2009).

